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No. 06-859

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SUPREME COURT, U.S.

In the Supreme Court of the United States

AARON RAISER,

Petitioner,

v.

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; BRIGHAM YOUNG UNIVERSITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Petitioner Aaron Raiser ("Mr. Raiser") unnecessarily divides into two issues the question of whether the Tenth Circuit Court of Appeals (the "Tenth Circuit") improperly applied preclusive effect to its prior decision affirming the district court's denial of Mr. Raiser's motion to proceed under a pseudonym. But Mr. Raiser's petition for certiorari incorrectly assumes that a justiciable controversy exists. Thus, the five questions presented by this petition for certiorari are as follows:

1. Does a justiciable controversy exist where Mr. Raiser has requested no relief that would redress the alleged injuries he has suffered?

2. Did the Tenth Circuit correctly apply an abuse of discretion standard of review to the question of whether the district court properly denied Mr. Raiser's motion for leave to proceed under a pseudonym?

3. Did the Tenth Circuit improperly base its affirmance of the district court's denial of Mr. Raiser's motion for leave to proceed under a pseudonym on principles of res judicata and collateral estoppel?

4. Was Mr. Raiser prejudiced because he was prevented from submitting a reply memorandum, even though his initial memorandum stated no basis for granting him leave to proceed under a pseudonym?

5. Was Mr. Raiser denied due process by being forced to proceed in the litigation using his true name?

PARTIES TO THE PROCEEDINGS AND RULE 26.9 STATEMENT

There are no parties to the proceedings other than those listed in the caption. Respondent Brigham Young University ("BYU") is a Utah non-profit corporation with no parent corporation, and no publicly-held corporation holds 10% or more of BYU's stock.

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OPINIONS AND ORDERS ENTERED IN THIS CASE

The district court's decision denying Mr. Raiser leave to proceed using a pseudonym is unreported. The Tenth Circuit's decision upholding the district court's decision is unofficially cited at *Raiser v. Church of Jesus Christ of Latter-day Saints*, 182 Fed. Appx. 810 (10th Cir. 2006) (unpublished disposition) ("*Raiser II*"). It has not been included in an official reporter. The Tenth Circuit's decision denying Mr. Raiser's petition for rehearing is unreported.

JURISDICTION

The Tenth Circuit decision of which Mr. Raiser seeks certiorari review in this Court was filed on May 31, 2006. The Tenth Circuit's order denying Mr. Raiser's petition for rehearing was filed on July 27, 2006. Mr. Raiser filed his petition for certiorari in this Court on October 23, 2006. Mr. Raiser invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). But, as explained below, the injury for which Mr. Raiser seeks relief is unredressable, thereby depriving Mr. Raiser of standing and this Court of jurisdiction.[1]

DETERMINATIVE PROVISIONS

U.S. Const. art. III, § 1, cl. 2 provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases

[1] Of course, this Court "has jurisdiction to determine its own jurisdiction." *See United States v. Ruiz*, 536 U.S. 622, 628 (2002).

> affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Fed. R. Civ. P. 10(a) provides as follows:

> Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Fed. R. Civ. P. 17(a) provides as follows:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest

> until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

DUCivR7-1(b)(3) provides as follows:

> Memoranda supporting or opposing all motions, except (i) motions to dismiss, (ii) motions for summary judgment as provided in DUCivR 56-1, and (iii) motions pursuant to Fed. R. Civ. P. 65, must not exceed ten (10) pages, exclusive of face sheet, table of contents, statements of issues and facts, and exhibits. A memorandum opposing a motion must be filed within fifteen (15) days after service of the motion or within such extended time as allowed by the court. A reply memorandum may be filed at the discretion of the movant within seven (7) days after service of the memorandum opposing the motion. A reply memorandum must be limited to rebuttal of matters raised in the memorandum opposing the motion and must not exceed ten (10) pages, exclusive of face sheet, table of contents, statements of issues and facts, and exhibits. No additional memoranda will be considered without leave of court. Attorneys may stipulate to shorter briefing periods and fewer memorandum pages, and the court encourages them to do so.

STATEMENT OF THE CASE

The pertinent facts in this case are adequately set forth in the Tenth Circuit's May 31, 2006, decision in *Raiser II*, 182 Fed. Appx. 810. That is the decision for which Mr. Raiser seeks certiorari review. Those pertinent facts, as that decision set them forth, are as follows:

> In 2002, Raiser filed a lawsuit against Brigham Young University ("BYU") and the City of Provo, Utah, alleging that during his interactions with BYU security and the Provo Police Department his civil rights were violated. . . . In his Motion to Dismiss, BYU made reference to Raiser's psychiatric history. Raiser moved to seal the record and moved to proceed under a pseudonym. Both of those motions were denied. Raiser appealed only the district court's denial of his motion to proceed using a pseudonym, and we affirmed, holding that Raiser had not demonstrated exceptional circumstances justifying his use of a pseudonym. Raiser v. Brigham Young Univ., 127 F.App'x 409, 411 (10th Cir. 2005) (unpublished) [("*Raiser I*")].
>
> In 2004, Raiser, now acting under the pseudonym T.G., filed a civil complaint against both BYU and The Church of Jesus Christ of Latter-day Saints (the "Church") alleging claims based on BYU's reference to his mental history in its motion during the 2002 litigation. . . . Contemporaneously, he filed a motion for permission to proceed in this case under a pseudonym. The district court denied the motion, and two motions for reconsideration. Raiser appeals.

Raiser II, 182 Fed. Appx. at 811 (footnote omitted). Following the Tenth Circuit's affirmance of the district court's decision denying Mr. Raiser leave to proceed using a pseudonym, Mr. Raiser petitioned the Tenth Circuit for rehearing. The Tenth Circuit denied that petition on July 27, 2006.

SUMMARY OF REASONS TO DENY THE PETITION

Mr. Raiser's petition for certiorari should be denied for four reasons. First, no justiciable controversy exists here. Mr. Raiser's name has already been connected with mental illness in prior litigation. Even if this Court decided that Mr. Raiser was improperly denied permission to proceed using a pseudonym, that decision would not provide any relief for the harm Mr. Raiser claims he has suffered. In other words, the cat that Mr. Raiser wishes to contain is already out of the bag; no decision by this Court can catch it.

Second, the decision of the Tenth Circuit—of which Mr. Raiser seeks certiorari review—was correct. Contrary to Mr. Raiser's assertions, the Tenth Circuit reviewed the district court's decision for abuse of discretion. And the Tenth Circuit did not improperly assign preclusive effect to its prior decision in *Raiser I*; indeed, it did not assign any preclusive effect at all. Although Mr. Raiser was entitled to file a reply memorandum if he so chose, he could not use that reply memorandum as a vehicle for introducing new arguments or rehabilitating his initial memorandum. Thus, because his initial memorandum stated no basis for granting him leave to proceed under a pseudonym—and indeed, it could not—given that Mr. Raiser's name was already connected with *Raiser I*—he was not prejudiced because he was prevented from filing a reply memorandum. Finally, Mr. Raiser was not

denied due process because he was made to proceed under his own name; his interest in privacy must be balanced against the public's right to public judicial proceedings, and Mr. Raiser did not demonstrate any exceptional circumstances that would warrant his efforts to proceed under a pseudonym. His due process rights were well protected by the Tenth Circuit's balancing of those interests.

Third, the circuit courts are unified regarding the proper analysis for determining when leave to proceed under a pseudonym should be granted; there is no circuit split to resolve.

Fourth, and finally, the analysis for determining when leave to proceed under a pseudonym should be granted is well established by the Federal Rules of Civil Procedure and virtually every circuit's case law. An opinion from this Court would add nothing to this already well-established jurisprudence.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 delineates several considerations this Court takes into account when deciding whether to grant a petition for certiorari. *See* Sup. Ct. R. 10. Although none of those considerations are present here, Mr. Raiser's petition should be denied for four reasons in particular. First, the injury Mr. Raiser claims to have suffered is unredressable. Second, the decision of the Tenth Circuit was correct. Third, there is no conflict among the circuits regarding the issues Mr. Raiser has presented in his petition. Fourth, and finally, the issues presented in Mr. Raiser's brief do not require resolution by this Court. The following sections discuss those reasons.

I. No Justiciable Controversy Exists in This Case.

This Court has made clear that "the irreducible constitutional minimum of standing contains three requirements," one of which is redressability, or "a likelihood that the requested relief will redress the alleged injury." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (internal quotation marks omitted). That redressability requirement is one-third of a triad that "comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *See id.* at 103–04; *see also* U.S. Const. art. III, § 2, cl. 1; *FW/PS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

Mr. Raiser's claims do not satisfy that requirement. As the Tenth Circuit pointed out in its opinion in *Raiser II*, Mr. Raiser's argument is really nothing more than a request "to put jack back in the box" after the Tenth Circuit's decision in *Raiser I* affirmed the district court's denial of leave to proceed under a pseudonym, requiring Mr. Raiser to use his own name in any further proceedings. *See Raiser II*, 182 Fed. Appx. at 812. In other words, Mr. Raiser's name is already "in the public domain" in connection with that litigation and, more specifically, the statements that were made in connection with that litigation regarding Mr. Raiser's mental condition. *See id.* at 811.

The sum total of the relief Mr. Raiser requests is "that the original order denying a pseudonym be vacated and re-heard in the trial court with a full opportunity to present argument on the motion for a pseudonym based on the outcome of the appeal." *See* Pet. for Cert. at 29–30. But that is no relief at all. Even if this Court grants Mr. Raiser every ounce of the relief he seeks, Mr. Raiser's name is already in the public

domain in connection with *Raiser I* and all the statements made therein regarding his mental state. No decision of this Court can undo that.

Moreover, even if, on remand, Mr. Raiser is allowed to proceed using a pseudonym, that would have no impact whatsoever on the district court's grant of summary judgment in favor of BYU, and the Tenth Circuit's recent affirmance of that grant, on the merits of Mr. Raiser's case. Mr. Raiser's case was a claim for money damages arising from the allegedly improper disclosure of his mental health in *Raiser I*. *See* Case No. 2:04cv896, Doc. No. 1, Compl. filed Sept. 23, 2004 (attached hereto as Addendum A). That decision is not before this Court for review, nor is the Tenth Circuit's denial of a stay of the district court proceedings on appeal.[2]

Mr. Raiser's injury is unredressable. That unredressability deprives Mr. Raiser of standing and this Court of jurisdiction. *See Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990) ("Article III, of course, gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process."). The entirety of Mr. Raiser's petition should be dismissed on that basis.

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[2] On September 16, 2005, Mr. Raiser requested a stay pending appeal from the Tenth Circuit. That request was denied on October 6, 2005. In the meantime, Mr. Raiser himself filed motions under his own name. *See* Case No. 2:02cv896, Doc. No. 140, Decl. for Third Mot. to Compel Discovery filed Aug. 5, 2005 (attached hereto as Addendum B). Mr. Raiser himself shooed the cat out of the bag by abandoning his pseudonym.

II. The Decision of the Tenth Circuit Court of Appeals Was Correct.

Mr. Raiser attributes four errors to the Tenth Circuit's decision. As the following sections demonstrate, none of those purported errors is grounded in fact or law.

A. The Tenth Circuit Applied the Correct Standard of Review.

Mr. Raiser argues that the Tenth Circuit erroneously subjected the district court's decision forbidding him from proceeding under a pseudonym to de novo review rather than abuse of discretion review. According to Mr. Raiser, had the Tenth Circuit reviewed the district court's decision for abuse of discretion, it would have recognized that the district court had abused *its* discretion, and Mr. Raiser would have prevailed on appeal. *See* Pet. for Cert. at 19–21. Mr. Raiser's argument fails for at least two reasons.

First, contrary to Mr. Raiser's contention, the Tenth Circuit explicitly stated that it "review[ed] a district court's denial of a motion to proceed under a pseudonym for abuse of discretion." *See Raiser II*, 182 Fed. Appx. at 811. This Court should take the Tenth Circuit's explanation of its analysis at face value. *See Hackett v. Barnhart*, 395 F.3d 1168, 1173 (10th Cir. 2005); *McGuckin v. Smith*, 974 F.2d 1050, 1056 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997). The Tenth Circuit therefore applied what Mr. Raiser concedes to be the proper standard of review.

Second, de novo review is more exacting than, and indeed encompasses, abuse of discretion review. *See United States v. Smith*, 308 F.3d 726, 748 (7th Cir. 2002) (noting that de

novo review is more stringent than abuse of discretion review); *see also Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998) ("An abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law."). It is difficult to understand how Mr. Raiser's claims could have failed under de novo review but prevailed under abuse of discretion review. Therefore, even if the Tenth Circuit had applied an incorrect standard of review—which it did not—such an error would not result in any injury to Mr. Raiser.

B. The Tenth Circuit Did Not Base its Decision on Principles of Res Judicata or Collateral Estoppel.

Mr. Raiser argues that the Tenth Circuit improperly applied principles of res judicata and collateral estoppel to hold that its decision in *Raiser I* wielded preclusive effect upon its decision in *Raiser II*. He articulates two reasons for why this is allegedly so. First, Mr. Raiser contends that because the decision denying him leave to proceed under a pseudonym was discretionary, it cannot wield any preclusive effect.[3] *See* Pet. for Cert. at 5–8. Second, Mr. Raiser argues that the Tenth Circuit's application of res judicata principles was inappropriate because (1) he did not have motivation or

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[3] Mr. Raiser supports this argument with only a recitation of facts followed by a restatement of his conclusion. *See id.* at 6–8. He cites no legal authority of any kind supporting that position. *See id.* Mr. Raiser has not adequately briefed this issue. *See* Fed. R. App. P. 28(a)(9) (requiring that argument contain "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). That failure is a sufficient basis for denial of Mr. Raiser's petition for certiorari on this issue.

need to contend as strenuously in *Raiser I*—as he does now—that a pseudonym was necessary to protect him; and (2) he only recently learned that BYU allegedly employed wrongful means to learn that he had a psychiatric history. *See* Pet. for Cert. at 28.

Both arguments fail for the same simple reason: the Tenth Circuit did not apply principles of collateral estoppel or res judicata to reject Mr. Raiser's contentions. The Tenth Circuit set forth its rationale for rejecting Mr. Raiser's contentions as follows:

> *In cases where the sensitive information has already been disclosed during a party's prior litigation under its real name, the social interest in allowing a party to proceed anonymously is limited.* Placing this matter in context, the issue brought to us for our consideration has been previously considered and ruled upon in Raiser I. In the earlier case, substantially similar assertions regarding the use of a pseudonym had been raised to a panel of this court, and denied. *The consequence of that denial is that Raiser's name remained in the public domain in connection with the litigation.* To paraphrase the present situation, Raiser's request is equivalent to asking us to put jack back in the box, that is, to collaterally review a previous decision of this court. That we cannot do. *Raiser has not demonstrated sufficient "exceptional circumstances" justifying his use of a pseudonym in this proceeding.*

Raiser II, 182 Fed. Appx. at 811–12 (internal citation omitted) (emphasis added). Although the Tenth Circuit referenced *Raiser I* and its similarity to *Raiser II*, it did so only to point out Mr. Raiser's inability to demonstrate

"exceptional circumstances" as required by Tenth Circuit jurisprudence: because Mr. Raiser had lost his prior appeal from a denial of leave to proceed under a pseudonym in *Raiser I*, when the issue of his "psychiatric history" was raised, his name was already associated with the psychiatric issues from which he sought to disassociate himself by proceeding under a pseudonym in this case. *See id.* The Tenth Circuit's approach is not only not an abuse of discretion, it is patently correct. *See M.M. v. Zavaras*, 139 F.3d 798, 802 (10th Cir. 1998). The Tenth Circuit did not refer to *Raiser I* to apply any preclusive effect it might possess to *Raiser II*. Indeed, the Tenth Circuit did not so much as mention res judicata, collateral estoppel, or their elements. *See Burrell v. Armijo*, 456 F.3d 1159, 1172 (10th Cir. 2006) (enumerating elements of collateral estoppel); *Nwosun v. Gen. Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997) (enumerating elements of res judicata). Mr. Raiser's contention that the Tenth Circuit improperly applied preclusive principles is therefore misplaced.

Despite the simplicity of the answer to the question Mr. Raiser poses, BYU wishes to address and correct several of Mr. Raiser's factual assertions. First, although it is not relevant to the resolution of this petition, BYU disputes Mr. Raiser's contention BYU's disclosure of Mr. Raiser's mental state was a breach of fiduciary duty or wrongful in any other way. *See* Pet. for Cert. at 28. Second, BYU disputes Mr. Raiser's contention that he somehow had less "motivation" to strenuously contend for leave to use a pseudonym in *Raiser I* than he did in this case. *See id. Raiser II* is, for all intents and purposes, identical to *Raiser I* in that both involved a motion—brought by Mr. Raiser—for leave to proceed using a pseudonym. Moreover, in both *Raiser I* and *Raiser II*, Mr. Raiser sought that leave for the same reason: to avoid any stigma attached to what he claims is a misleading psychiatric

history. Third, the motivations and intentions that influenced Mr. Raiser's litigation decisions are not part of the record on appeal and, at any rate, have no bearing on this petition. *See id.* Fourth, BYU disputes that the denial of leave to proceed using a pseudonym forced Mr. Raiser to "suffer the same, or greater injury, if he were required to litigate in his actual name." *See id.* The pseudonym issue is separate from the merits of Mr. Raiser's case, which was a claim for money damages stemming from BYU's allegedly wrongful disclosure of Mr. Raiser's mental state in *Raiser I*. *See* Addendum A, Compl. The denial of leave to use a pseudonym did not cause him an equivalent harm.

In fine, the Tenth Circuit decision was not an improper application of res judicata or collateral estoppel principles. This Court should not grant Mr. Raiser's petition as it pertains to this issue.

C. The District Court Did Not Abuse Its Discretion By Deciding Mr. Raiser's Motion Without A Reply Memorandum from Mr. Raiser.

Mr. Raiser argues that although BYU and the Church did not timely file their memoranda in response to Mr. Raiser's motion for leave to proceed using a pseudonym, the district court decided Mr. Raiser's motion based on new issues raised in those memoranda and without allowing Mr. Raiser to file a reply memorandum. *See* Pet. for Cert. at 18–19. In responding to that contention, the Tenth Circuit concluded that although Mr. Raiser was entitled to file a reply memorandum, nothing in that memorandum could have altered the decision of the district court based on the papers before it. *See Raiser II*, 182 Fed. Appx. at 812. The Tenth Circuit was correct.

Pursuant to District of Utah Rule 7-1(b)(3), Mr. Raiser indisputably was permitted to file a reply memorandum. But that reply memorandum "must be limited to rebuttal of matters raised in the memorandum opposing the motion." *See* DUCivR7-1(b)(3); *see also King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1091 n.2 (10th Cir. 1994) (issues not raised in an opening memorandum are waived). In other words, that reply memorandum could not have served as a vehicle for raising new arguments. As the Tenth Circuit correctly pointed out, nothing in Mr. Raiser's initial memorandum provided any basis for concluding that Mr. Raiser had presented the requisite "exceptional circumstances" justifying use of a pseudonym. *See Zavaras*, 139 F.3d at 802; *see also* Case No. 2:04cv896, Doc. No. 3, Mot. for Supplemental Relief filed Sept. 23, 2004 (excerpts of which are attached hereto as Addendum C). Indeed, it could not have: as demonstrated above, Mr. Raiser's name was already in the public domain in connection with *Raiser I* and the statements regarding Mr. Raiser's mental state made therein, and that fact alone supports the Tenth Circuit's decision. Mr. Raiser therefore cannot demonstrate that he was prejudiced because he did not file a reply memorandum.

Moreover, Mr. Raiser's petition provides no insight as to what "new" issues were raised in the response memoranda of BYU and the Church. *See* Pet. for Cert. at 19. Indeed, nothing "new" was raised in either memorandum. Both BYU and the Church responded only to Mr. Raiser's contention that he should be allowed to proceed using a pseudonym. *See* Case No. 2:04cv896, Doc. No. 29, Church's Mem. in Opp. filed April 19, 2005 (attached hereto as Addendum D); Case No. 2:04cv896, Doc. No. 32, BYU's Mem. in Opp. filed April 20, 2006 (attached hereto as Addendum E). And both BYU and the Church relied on the reasons prior courts had articulated for denying Mr. Raiser's previous attempt to

proceed using a pseudonym. It goes without saying that Mr. Raiser was a party to those proceedings and was surely aware of the courts' resolution of that attempt. Mr. Raiser was not denied the opportunity to respond to "new" issues.

D. Mr. Raiser Was Not Denied Due Process of Law.

Mr. Raiser argues, in essence, that the district court's denial of his request to proceed using a pseudonym denied him due process of law. He attempts to couch that argument in a perceived conflict between Federal Rules of Civil Procedure 10 and 17—which require litigants to proceed using their own names—and the Due Process Clause of the Fifth Amendment. *See* Pet. for Cert. at 8; *see also* Fed. R. Civ. P. 10(a), 17(a). But there is no such conflict, and Mr. Raiser was not denied due process of law.

It is true that the Federal Rules of Civil Procedure require, without any evident exception, that litigants proceed in their own names. *See* Fed. R. Civ. P. 10(a), 17(a). But despite that seemingly rigid rule, courts have recognized the occasional need for a pseudonym under certain circumstances and have interpreted Rules 10(a) and 17(a) as creating a "presumption of openness" rather than a rigid prohibition on the use of pseudonyms. *See Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992). To determine whether a litigant should be permitted to proceed using a pseudonym, courts have developed an analysis that balances a litigant's right to privacy with the public's countervailing common law right of access to judicial proceedings, which is grounded in the First Amendment. *See Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000). Courts must balance those two rights when ruling on a motion requesting leave to proceed using a pseudonym. *See, e.g., id.*; *Zavaras*,

139 F.3d at 803; *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *Frank*, 951 F.2d at 323; *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). That balancing requires an analysis of various factors, including (1) the justification for pseudonym use, (2) risk of harm if a pseudonym is not employed, (3) the age of the movant, (4) the nature of the defendant, and (5) the risk of unfairness. *See James*, 6 F.3d at 218; *see also Advanced Textile Corp.*, 214 F.3d at 1068; *Zavaras*, 139 F.3d at 803.

Thus, there is no conflict between Rules 10(a) and 17(a) and due process principles. Even despite the facially inflexible language of those rules, courts interpret them in a manner sensitive to litigants' right to privacy while bearing in mind that the public has a concomitant right of access to judicial proceedings. As applied, Rules 10(a) and 17(a) do not prohibit a litigant from proceeding under a pseudonym in all cases.

Moreover, Mr. Raiser was not denied due process. The Tenth Circuit engaged in the aforementioned balancing test, as required by Tenth Circuit jurisprudence. *See Raiser II*, 182 Fed. Appx. at 811; *see also Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000). And, as demonstrated above, Mr. Raiser simply did not demonstrate an exceptional circumstance justifying use of a pseudonym; he had already failed in his prior attempt to obtain leave to proceed using a pseudonym, and there was nothing to be gained by granting such a request after the fact. *See Raiser II*, 182 Fed. Appx. at 812. It is true that some courts have held that mental illness may be one circumstance justifying use of a pseudonym. *See Doe v. Blue Cross & Blue Shield of R.I.*, 794 F. Supp. 72, 74 (D.R.I. 1992). But, as explained above, Mr. Raiser's mental state could not serve as a basis for permitting him to use a pseudonym in this case. As explained

supra, given the Tenth Circuit's decision in *Raiser I*, any stigma that may arise because of statements referring to Mr. Raiser's mental state has already arisen. Permitting Mr. Raiser to proceed under a pseudonym in this case would not have provided Mr. Raiser any relief.[4] And it is well accepted that the circumstances justifying use of a pseudonym are "exceptional." *See Femedeer*, 227 F.3d at 1246. Such exceptional circumstances were not present in this case.

III. The Circuits Are Not Split Regarding the Analysis Applicable to Motions Seeking Leave to Proceed Using a Pseudonym.

Without exception, every circuit that has reviewed a district court decision granting or denying leave to proceed under a pseudonym has employed the same analysis: a balancing of the litigant's privacy interests with the public's right to open and public proceedings. *See, e.g.*, *Advanced Textile Corp.*, 214 F.3d at 1068; *Zavaras*, 139 F.3d at 803; *James*, 6 F.3d at 238; *Frank*, 951 F.2d at 323; *Stegall*, 653 F.2d at 186. District courts from remaining jurisdictions have applied the same analysis. *See Doe v. Hartz*, 52 F. Supp. 2d 1027, 1045 (N.D. Iowa 1999) *Doe v. Bell Atl. Business Sys. Servs., Inc.*, 162 F.R.D. 418, 420 (D. Mass. 1995); *Doe v. Provident Life & Accident Ins. Co.*, 176 F.R.D. 464, 467–68 (E.D. Pa. 1997). In sum, the various jurisdictions of the federal system are united in applying this approach. This

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[4] Many of the arguments Mr. Raiser presents in his petition for certiorari request this Court to review the Tenth Circuit's decision in *Raiser I*, not *Raiser II*. But the time has long passed for Mr. Raiser to petition this Court for certiorari review of the Tenth Circuit's decision in *Raiser I*. *See* Sup.Ct.R. 13.1.

Court need not grant Mr. Raiser's petition for certiorari to impose uniformity on this already-uniform approach.[5]

IV. The Issues Presented in Mr. Raiser's Petition Do Not Require This Court's Attention.

There is already a clear mechanism in place for determining when a litigant may proceed using a pseudonym. Federal Rule of Civil Procedure 10 already requires pleading captions to "include the names of all the parties." *See* Fed. R. Civ. P. 10(a). Federal Rule of Civil Procedure 17 already provides that "[e]very action shall be prosecuted *in the name of the real party in interest*." *See* Fed. R. Civ. P. 17(a) (emphasis added). In other words, there already exists a clearly established presumption that actions are to be brought in the parties' own names. As the cases cited in the preceding section demonstrate, the courts of appeal have had no difficulty applying that standard or granting exceptions to that standard as appropriate. Granting certiorari to review the Tenth Circuit's decision in this case would add nothing to that established—and proper—jurisprudence.

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[5] Even if the Tenth Circuit had misapplied this analysis—which it did not—that is not a basis for granting Mr. Raiser's petition. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

CONCLUSION

For all of the foregoing reasons, this Court should deny Mr. Raiser's petition for writ of certiorari.

Dated: January 19, 2007.

Respectfully submitted,

DANIEL L. STEELE
Counsel of Record
BENNETT TUELLER JOHNSON & DEERE
3165 East Millrock Dr., Suite 500
Salt Lake City, UT 84121
(801) 438-2000

Counsel for Respondent
Brigham Young University

APPENDIX

ADDENDUM A

In the United States District Court
District of Utah

[Filed September 23, 2004]

Case No. 2:04cv00896 TC

T.G.,
Plaintiff,

v.

The Church of Jesus Christ
Of Latter-Day Saints,
Brigham Young University,
Defendants.

COMPLAINT

Plaintiff complains against defendants and for causes of action alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff is a resident of Fresno County, State of California;

2. Defendants are each corporations organized and existing pursuant to the laws of the State of Utah. At

all times relevant hereto, was authorized to and was doing business in Utah.

3. This action is brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. and 20 U.S.C. § 1232g and state common law.

4. Jurisdiction is proper in this court pursuant to 28 U.S.C. § 1331, causes of action exists founded upon the U.S. Constitution or federal law.

5. Jurisdiction is proper in this court pursuant to 28 U.S.C. § 1332, state law causes of action exists and diversity exists; the amount in controversy exceeds $75,000 exclusive of costs.

6. Venue is proper in this court is proper in this court pursuant to 28 U.S.C. § 1391, the acts giving rise to this action having arisen in Utah.

ALLEGATIONS RELEVENT TO ALL CLAIMS FOR RELEIF

7. On or about January 1992 Plaintiff spoke with his stake president of the BYU 5th Stake, Eugene Bramhall.

8. This was an interview in order for Plaintiff to get into BYU as a graduate student.

9. Plaintiff had previously graduated from BYU.

10. As a condition, without giving a reason why, Plaintiff was required to meet with a psychologist at the BYU counseling center.

11. Eugene Bramhall was also the general counsel for BYU.

12. Plaintiff met with the psychologist and answered some questions he believed were pertinent and declined to answer many questions or to take any tests.

13. Plaintiff was allowed to enroll in classes at BYU spring term for 1992.

14. It is alleged that prior to the interview Plaintiff's bishop Dan Towsey, informed the stake President that Plaintiff had been institutionalized in another state and "declared incompetent".

15. This information that Plaintiff had a psychiatric history was in turn communicated to others of the general counsel staff during the course of business.

16. This information, that Plaintiff had an alleged psychiatric history or the like, was also kept part of Plaintiff official school records.

17. On or about 2 November 2003, defendant Brigham Young University through their General Counsel published that information in a public document that the Plaintiff in this case had a "known ... psychiatric history".

18. Said information was published out of malice.

19. This publication was in violation of § 1232g - Family educational and privacy rights of 28 U.S.C. which requires that a student's education records be kept confidential.

20. However, despite that portrayal of Plaintiff, that information was only known for all practical purposes to the defendants.

21. While if the fact that there exists any court cases regarding Plaintiff's alleged institutionalization, General Counsel to BYU would not have been able to say for sure that the person referred to in any such case was indeed Plaintiff without the corroborating information which General Counsel to BYU received via the church channels such as his bishop and stake president.

22. Further defendant Brigham Young University could not have been certain that Plaintiff in this case was the person in any court case mentioning his institutionalization without the corroborating information from the defendant's police.

23. Plaintiff's stake president in giving out said confidential information was acting within the scope of his duties for The Church of Jesus Christ Of Latter-Day Saints who benefit from the service of their stake presidents.

24. Alternatively, information that Plaintiff had been institutionalized could have come from the defendant's police department who would be obligated to keep that information confidential and separate from their employer.

25. This information was also given to the defendant's administrators via either their General Counsel or police or both.

26. Any such information concerning Plaintiff would be required to be maintained confidential within the church.

27. Despite the fact Plaintiff was institutionalized he did not have a psychiatric history and was so institutionalized due to lies of others and some very extreme due process of law violations.

28. The other allegation based on circumstantial facts is that the police communicated the information to defendant's General Counsel or administration that Plaintiff was institutionalized.

29. It is alleged on circumstantial facts is that defendant's General Counsel communicated the administration the information that Plaintiff was institutionalized.

30. It is alleged on circumstantial facts is that defendant's General Counsel or administration communicated the information that Plaintiff was institutionalized to the police.

31. That information induced or influenced the administration or police to disbelieve any complaints Plaintiff had regarding any mistreatment and torts by defendant's personnel which had occurred such as civil rights violations, defamation by the school's newspaper in various articles about Plaintiff and breach of privacy by certain student security personnel.

32. That information induced or influenced police to treat Plaintiff differently and comit torts against him.

33. Defendant BYU has also violated the American's with disabilities Act in treating him differently and allowing torts to be committed against him and disregarding his complaints concerning the torts because of his mental disability or perceived mental disability.

34. Also it amounts to a violation of the separation of church - state clause of the U.S. Constitution as the sponsoring church of defendant is sharing otherwise confidential information with the police force of defendant via their stake president and visa versa.

35. The stake president is sharing confidential information about Plaintiff with the police.

36. The stake president and general counsel are sharing that information with the administration.

37. The police are sharing that information with the administration.

38. Plaintiff was a student there in 2002 and was subject to various civil rights violations such as unreasonable seizure and had student security breach Plaintiff's privacy by approaching a classmate of Plaintiff's and divulging damaging information about Plaintiff to another classmate based on confidential police records.

39. Defendant's administration has been deliberately indifferent to Plaintiff's complaints about these torts.

FIRST CLAIM FOR RELEIF
(Breach of Privacy - Both Defendants)

40. Plaintiff incorporates the allegations contained in paragraphs 1 through 39 above as if set forth in full at this point.

41. Plaintiff had a reasonable expectation of privacy that any psychiatric history that would have been communicated to Plaintiff's state president by his bishop or to the police would have remained confidential and not be published in public forum.

42. Defendants have taken a private fact of the Plaintiff that were made in confidence and published those in a public forum and that fact was not of public concern.

43. Defendants' actions were intentional and highly offensive to a reasonable person of the community.

44. Plaintiff has been injured as a result of the breach mentally and emotionally;

45. Plaintiff has suffered damage to his reputation also and a loss of respect amongst his peers.

46. Plaintiff has as a result, suffered a damage to his career.

47. Actions of defendant are the proximate cause of Plaintiff's injury.

SECOND CLAIM FOR RELEIF
(Defamation - BYU)

48. Plaintiff incorporates the allegations contained in paragraphs I through 47 above as if set forth in full at this point.

49. Defendant has published false and misleading information of and concerning Plaintiff to other persons.

50. Defendant's actions were intentional.

51. Actions of defendant did and have tended damaged reputation of Plaintiff.

52. Plaintiff has been injured as a result of Defendant's actions.

53. The communications that Plaintiff has the alleged disability is false, leading a person to believe Plaintiff is mentally ill.

54. Plaintiff has been injured as a result, suffering a damage to his reputation in the community and to those reading said publication and causing damage to his career.

55. Actions of defendant are the proximate cause of Plaintiff's injury.

56. Plaintiff has been injured in his reputation, has been damaged emotionally.

THIRD CLAIM FOR RELEIF
(False Light - BYU)

57. Plaintiff incorporates the allegations contained in paragraphs 1 through 56 above as if set forth in full at this point.

58. Defendant did publish false and misleading information to a wide group of persons and to the public that Plaintiff had a "known ... psychiatric history".

59. That information is false and misleading to induce the reader to believe Plaintiff has some psychiatric disability which is not true.

60. Such publication placed Plaintiff in false light.

61. Such publication of false and misleading is outrageous and highly offensive to a reasonable person in the community.

62. The defendant was aware of the falsity of their publication or disregarded whether the matter was false or not.

63. Plaintiff has been injured as a result, suffering a damage to his reputation in the community and to those reading said publication and causing damage to his career and has been damaged emotionally.

64. Actions of defendant are the proximate cause of Plaintiff's injury.

FOURTH CLAIM FOR RELEIF
(42 U.S.C. § 1983 Violation of Separation of Church State - 1st Amend. - BYU)

65. Plaintiff incorporates the allegations contained in paragraphs 1 through 64 above as if set forth in full at this point.

66. Defendant is authorized to maintain a state empowered police force via state statute.

67. That statute, which allows defendant to maintain a state empowered police force, fosters an excessive governmental entanglement with religion.

68. Defendant's police are supervised and controlled by a religious institution that is presided over by a full time church leader. The typical city council/mayorial control over the police via the electorate does not exist.

69. Insufficient state oversight and control of that authority does not exist.

70. Defendant has used the state police power in a manner not intended by the state in using the police to further the religious objectives of defendant.

71. The state/church entanglement has injured Plaintiff has allowed private information concerning Plaintiff to be exchanged between defendant and its police.

72. Said information was exchanged and released to the public and did damage Plaintiff in his reputation and career.

73. Said misuse of information resulted from a religiously oriented custom or policy on behalf of the defendant.

74. Said misuse of information otherwise resulted from a custom or policy, failure to train or lack of administrative oversight on behalf of the defendant.

75. Plaintiff has suffered damage to his reputation, including loss work opportunities and suffered mentally and emotionally.

76. Actions of defendant are the proximate cause of Plaintiff's injury.

FIFTH CLAIM FOR RELEIF

(Violation of American's with disabilities Act - BYU)

77. Plaintiff incorporates the allegations contained in paragraphs 1 through 76 above as if set forth in full at this point.

78. Defendant has allowed torts to be committed against him due to their belief that Plaintiff has a mental disability.

79. Defendant has ignored Plaintiff's complaints regarding the torts due to that belief.

80. Plaintiff has suffered damage to his reputation, including loss work opportunities and suffered mentally and emotionally.

81. Actions of defendant are the proximate cause of Plaintiff's injury.

ON EACH OF PLAINTIFF'S CLAIM S FOR RELEIF

1. For Damages of $1,750,000 against Brigham Young University; For Damages of $1,750,000 against The Church of Jesus Christ Of Latter-Day Saints;

2. For costs of suit;

3. For such further relief as the Court deems proper under the circumstances.

DATED this September 20, 2004.

/s/_____
T.G.

ADDENDUM B

In the United States District Court
District of Utah

[~~Filed August~~ 5, 2005]

Case No. 2:04 CV 896

Aaron Raiser,
Plaintiff,

v.

The Church of Jesus Christ
Of Latter-Day Saints,
Brigham Young University,
Defendants.

Declaration for Third Motion to Compel Discovery

Judge: Campbell

I, Aaron Raiser, certify that I have attempted in good faith to resolve the issues contained in the Third motion to compel discovery with the defendants to no avail.

DATED this July 31, 2005.

/s/_____
Aaron Raiser

I certify that a true and correct copy of **Declaration for Third Motion to Compel Discovery** was mailed August 1, 2005 to
Stephen W. Geary (Counsel for Church)
60 East South Temple, #1800
Salt Lake City, Utah 84145-0120
Dan Steele (Counsel for Brigham Young University)
3865 S. Wasatch Blvd. Suite 300
Salt Lake Citify, Ut 84109

/s/_____
Aaron Raiser

ADDENDUM C

In the United States District Court
District of Utah

[Filed September 23, 2004]

Case No. 2:04cv00896 TC

T.G.,
Plaintiff,

v.

The Church of Jesus Christ
Of Latter-Day Saints,
Brigham Young University,
Defendants.

Motion for Pseudonym;
Memorandum of Points and
Authorities

Plaintiff motions for a Pseudonym in the captioned case. This motion is based on the following memorandum and the Affidavit of T.G.

This case involves a statement published by defendants that Plaintiff has a "known ... psychiatric history" and the related facts surrounding that statement. Because the information of the cases is of a private and personal nature

and because Plaintiff would be damaged by giving out his identity to those outside this case, and because other federal courts allow for anonymity in similar cases, a Pseudonym is sought.

If a Pseudonym is not permitted Plaitniff asks that the case not be made public until after he can appeal. A Pseudonym would also appear on the court docket for the counsel of record.

Respectfully,

DATED September 20, 2004.

/s/_____
T.G.

Memorandum of Points and Authorities

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IV. Based on the facts of this case, and in order to maintain consistency with other federal courts, a pseudonym should be allowed . . . . . (24)

* * *

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Summary of the Argument

Neither the Constitution or Federal Rules of Civil Procedure specifically state that the use of a pseudonym is forbidden and its use has been sanctioned by the Supreme Court in appropriate circumstances. This Circuit uses a balancing test between the competing public and private interests when deciding whether to allow a pseudonym in a particular case. Other Circuits allow for the use a pseudonym where a litigants mental health status is an issue of the case or would otherwise be made public. Based on the facts of this case and in order to maintain consistency with other federal courts, a pseudonym should be allowed.

I.
The use of a pseudonym is not specifically forbidden by the Constitution or FRCP.

The Constitution, Amendment VI, guarantees public trials for criminal trials and is silent as to civil trials.

FRCP Rule 10(a) requires the litigants name to appear in the caption. Rule 17 requires the case to be brought in the actual name of the litigant. However, in *Doe v. Bolton,* 410 U.S. 179 (1973) (a case involving abortion) and *Poe v. Ullman,* 367 U.S. 497 (1961) (challenge to state contraceptive law) the Supreme Court implicitly allowed pseudonyms without incident and Courts since have generally recognized exceptions to Rules 10(a) & 17. *See*

* * *

[p.8]

Bates v. City of Little Rock, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).[4]

A Rhode Island federal court stated the following concerning the appropriateness of allowing a plaintiff to proceed using a pseudonym:

> I find persuasive the analysis of litigants' requests for pseudonymity set forth in *Doe v. Rostker*, 89 F.R.D. 158 (N.D. Cal. 1981). The Court explained that the general rule requiring plaintiffs to include the names of all parties in their complaints is not set in stone: Courts have carved out limited exceptions to [this rule] where the parties have strong interests in proceeding anonymously. Although no express standard exists setting forth these exceptions, this court's review of numerous cases has uncovered some classifiable characteristics. The most common instances are cases involving abortion, mental illness, personal safety, homosexuality, transsexuality and illegitimate or abandoned children in welfare cases. The common thread running through these cases is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record.

See *John Doe v. Blue Cross & Blue Shield*, 794 F. Supp. 72, 74 (D.R.I., 1992).

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[4] Noted in *Defendant Doe's Quest for Anonymity: Is the Hurdle Insurmountable?*, 29 Loy. U. Chi. L.J. 141, 147 (1997).

II.

This Circuit uses a balancing test.

The Tenth Circuit uses a "balancing of competing interests" test when considering the appropriateness of using a pseudonym in a case. See M.M. v. Zavaras, 139 F.3d 798, 800 (10th Cir. 1998). "The issue of

* * *

[p.21]

are given only custodial care and not treatment, all society loses from their lessened ability to work and to contribute.

III.

Other Circuits allow for the use a pseudonym where a litigants mental health status is an issue.

Federal cases where disclosure of a litigant's psychiatric history or mental health status shows that such cases generally allow a pseudonym.

Doe v. Bolton, 410 U.S. 179 (1973)- pseudonym allowed where a woman alleged that her condition of poverty and of being abandoned by her husband as well as being a psychiatric patient rendered her to be unable to care for or support the new child.

Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979) - pseudonym allowed for a psychiatric patient who sought class action status, requesting a preliminary injunction to force defendant

government agencies to pay for care in a private mental institution.)

Woe v. Cuomo, 638 F. Supp. 1506 (D.N.Y., 1986) *rev'd,* 729 F.2d 96 (2d Cir.), *cert. denied,* 105 S. Ct. 339 (1984) - pseudonym allowed for Plaintiff psychiatric patients who brought an action against defendant governor, defendant doctor, defendant commissioner, and defendant hospital alleging constitutional violations related to their right to adequate treatment.

* * *

[p.24]

vocation as an attorney, his privacy interest was sufficient to proceed anonymously.

Others cases allowing pseudonymity for alleged mental illness are *Doe v. Harris,* 495 F. Supp. 1161 (S.D.N.Y.1980); *Doe v. Anrig,* 692 F.2d 800 (lst. Cir. 1982); *Doe v. New York Univ.,* 666 F.2d 761 (2d Cir. 1981); *Doe v. Marshall,* 622 F.2d 118 (5th Cir. 1980), *cert. denied,* 451 U.S. 993 (1981); *Koe v. California,* 573 F.2d 761 (2d Cir. 1978); *Doe v. Hampton,* 566 F.2d 265 (D.C. Cir. 1977); *Anonymous v. Anonymous,* 558 F.2d 677 (2d Cir. 1977); *Larry P. v. Riles,* 495 F. Supp. 926 (N.D. Cal. 1979); *Doe v. Gallinot,* 486 F. Supp. 983 (C.D. Cal. 1979), *aff'd,* 657 F.2d 1017 (9th Cir. 1981); *Doe v. Lally,* 467 F. Supp. 1339 (D. Md. 1979); *Woe v. Mathews,* 408 F. Supp. 419 (E.D.N.Y. 1976), *aff'd mem. sub nom. Woe v. Weinberger,* 562 F.2d 40 (2d Cir. 1977), *cert. denied,* 434 U.S. 1048 (1978).

IV.

Based on the facts of this case, and in order to maintain consistency with other federal courts, a pseudonym should be allowed.

Plaintiff has shown that he has a very strong interest in proceeding with a pseudonym because of the social stigma surrounding having a "psychiatric history" and the subsequent difficulties arising from that label and he has shown that this information can easily cause harm in finding work or to his career.

[p.25]

While the public has an interest in being aware of who litigants are, that interest is not a protected interest, and the main interest lies with the litigants themselves and Courts generally have recognize exceptions and allowed a litigant to proceed pseudonymously. The proceedings themselves would still be public and any litigant having an significant interest in the outcome of the case could seek to join the case. Thus the public interest in this case is outweighed by the Plaintiff's interest in avoiding social stigma and avoiding difficulties that could affect his reputation his career or his hireability. Society also has an interest in Plaintiff being gainfully employed and productive and they have an interest in seeing that each member of society have fair access to the court system to redress wrongs which inevitably benefit society as a whole.

Further supporting allowing Plaintiff to proceed pseudonymously is that many other federal courts permit a litigant to use a pseudonym where a litigant has a mental health or psychiatric history which fact could be found out by

the public via the litigation, causing harmful prejudice or social stigma against the litigant, which the courts find outweighs the public interest in having the name of the litigant made public.

In light of these arguments Plaintiff therefore asks that a pseudonym be allowed.

* * * *

ADDENDUM D

R. Willis Orton (2484)
Stephen W. Geary (9635)
KIRTON & McCONKIE
60 East South Temple, Suite 1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

Attorneys for Defendant The Church of
Jesus Christ of Latter-day Saints

In the United States District Court
For the District of Utah
Central Division

[Filed April 19, 2005]

Case No. 2:04cv00896 TC

T.G.,
Plaintiff,

v.

The Church of Jesus Christ
Of Latter-Day Saints, and
Brigham Young University,
Defendants.

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PSEUDONYM

Defendant The Church of Jesus Christ of Latter-day Saints (the "Church"), through counsel, hereby opposes Plaintiff's Motion for Pseudonym dated September 20, 2004, for the same reasons which compelled the court in *Aaron Raiser v. Brigham Young University, et al.*, case no. 2:02cv975 TC, to deny the plaintiff's motion for pseudonym in that matter and for the reasons and case law set forth in the March 29, 2005, Order and Judgment of the United States Court of Appeals for the Tenth Circuit in *Raiser v. Brigham Young University,* No. 04-4025, a copy of which is attached hereto as Exhibit "A".

DATED this 19th day of April, 2005.

KIRTON & McCONKIE

By /s/_____
R. Willis Orton
Stephen W. Geary

Attorneys for Defendant The Church of Jesus Christ of Latter-day Saints

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2005 I caused a true and correct copy of the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PSEUDONYM** to be hand-delivered to the following:

T.G.

(at the United States Courthouse)

Daniel Steele
Bennett, Tueller Johnson & De re
3865 South Wasatch Boulevard, Suite 300
Salt Lake City, Utah 84109-3865

and a copy mailed, postage prepaid, to:

Erik G. Davis
Office of General Counsel
Brigham Young University
A-350 ASB
Prove, Utah 84602

/s/_____
R. Willis Orton

ADDENDUM E

Daniel L. Steele (6336)
David M. Kono (8770)
Bennett Tueller Johnson & Deere
Attorneys for Defendant Brigham Young University
3865 South Wasatch Blvd., Suite 300
Salt Lake City, Utah 84109
Telephone: (801) 272-5600

In the United States District Court
For the District of Utah
Central Division

[Filed April 20, 2005]

Case No. 2:04cv00896 TC

T.G.,
Plaintiff,

v.

The Church of Jesus Christ
Of Latter-Day Saints, and
Brigham Young University,
Defendants.

DEFENDANT BRIGHAM YOUNG UNIVERSITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PSEUDONYM

Defendant Brigham Young University ("BYW"), by and through its counsel, hereby joins in The Church of Jesus Christ of Latter-Day Saints' (the "Church") Memorandum in Opposition to Plaintiff's Motion for Pseudonym (the "Church's Memorandum") filed by Church on or about April 19, 2005 and adds the following additional argument.

ARGUMENT

Plaintiff desires to pursue his claims under the cover of anonymity and has, to date, identified himself as TG. However, as correctly articulated by this Court in a hearing on various pending motions held on April 19, 2005, Plaintiff has not obtained this Court's permission to proceed under a pseudonym.[1]

While some courts have taken the position that an action filed under pseudonym is null and void per se, see e.g., Doe v. United States Department of Justice, 93 F.R.D. 483, 484 (D. Colo. 1982) (holding that a "civil action has not been

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[1] In the hearing of April 19, 2005, the Court correctly denied Plaintiff's Motion for Sanctions wherein Plaintiff argued that the Church's reference to other legal proceedings filed by Plaintiff, including one other pending matter now before this very Court, breached his privacy by revealing his true identity. In denying Plaintiff's Motion for Sanctions, the Court properly noted that Plaintiff does not have a vested privacy fight in his use of a psuedonym because he does not have the Court's permission to proceed under the cover of a psuedonym.

commenced and it will not be commenced unless and until ... the title of the action shall include the names of all the parties"), the 10th Circuit has recognized a narrow exception for cases involving "matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity." M.M v. Zavaras, 139 F.3d 798, 803 (10th Cir. 1998) (additional citations omitted). Regardless, to BYU's counsel's knowledge, no case provides the inherent fight for a plaintiff to proceed anonymously without a court order. Certainly, Plaintiff has not cited to any such case nor can he point to any court order that authorizes his efforts to proceed as an anonymous litigant.

Furthermore, the recent decision by the 10th Circuit Court of Appeals in Raiser v. Brigham Young University, No. 04-4025, a copy of which is attached as Exhibit "A", is dispositive of Plaintiff's Motion. Plaintiff cannot point to any facts or circumstances which materially distinguish his Motion here with the virtually similar motion sought in the Raiser ease which was denied by this Court and recently affirmed, on an interlocutory basis, by the 10th Circuit Court of Appeals.

BYU respectfully submits that Plaintiff is not entitled to proceed under a pseudonym. His Motion should therefore be denied with an order that further requires Plaintiff to forthwith file an appearance in his own name.

DATED this 20th day of April, 2005.

BENNETT TUELLER JOHNSON & DEERE

/s/_____
Daniel L. Steele
Attorneys for Defendant
Brigham Young University

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2005, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **DEFENDANT BRIGHAM YOUNG UNIVERSITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PSEUDONYM**, to:

R. Willis Orton
Stephen W. Geary
KIRTON & McCONKIE
60 East South Temple, Suite 1800
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